

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 15,027

)

Appeal of )

)

INTRODUCTION

The petitioner appeals a decision by the Department of Social and Rehabilitation Services (SRS) revoking her Family Day Care Home Registration certificate. The issue is whether or not the petitioner violated regulations involving the health and safety of children in her care and, if so, whether the Commissioner properly exercised his discretion in determining that she should not be a registered day care provider due to those violations.

FINDINGS OF FACT

1. The petitioner applied for a family day care registration certificate in December of 1996 and following an inspection of her home on January 29, 1997 was granted a certificate on February 28, 1997. She had been registered for about three years before this time as a day care home provider at another address. During the winter of 1996 and 1997, which is the time at issue in this appeal, the only children in the petitioner's care were the three preschool-aged children of her sister, in addition to her own two preschool-aged children. As part of her certification, the petitioner was required to and did read the regulations for day care home providers.
2. The petitioner's home is located on the corner lot of a twenty-house subdivision where a secondary road (25 mph speed limit) meets a residential street which ends in a cul-de-sac (15 mph speed limit). The petitioner's house faces the residential street carved out of a former farm field and is on a flat lot devoid of trees or large shrubs, and which is separated from the secondary road by a small drainage ditch that runs along the side of the lot. The front yard is bordered by a sidewalk which ends at the secondary road. The lot is deep, and the front porch of the home cannot be seen from the perimeter of the side lot as it runs along the secondary street because the house is located to the front of the lot, and because the garage is between the porch and the secondary road side of the house. The yard was not fenced at the time at issue in this appeal.
3. Shortly after noon on a weekday in late winter, either February or March of 1997, the petitioner was out in the backyard playing with the five children in her care. They were in snowsuits and boots, and the yard and streets were icy. When it came time to go inside, the petitioner walked with two children from the backyard and met three others who were playing the side yard on the non-road side of the house. She

took the two children she was with (two three year olds) around to the front of the house and walked into the mudroom with them and called to the three others, two five year olds and a two year old, to follow behind her. While she was inside the front door taking the boots off of the first two children, the two-year old, who had been standing on the front part of the side lawn, bolted away from the others, ran down the sidewalk in front of the house toward the secondary road, rounded the corner and ran down the side lot on the secondary road side for some forty or fifty feet. There he slipped on some ice and fell on his hands and face into the street. He was followed by the two five year olds who stood on the side of the street encouraging the two year old to get up and get out of the street. There is no evidence that either of these two older children was ever in the street.

4. A woman who lives in a house at the end of the cul-de-sac, and who also runs a daycare home, was driving on the secondary road alongside the petitioner's side lot toward the corner where the petitioner's house is located when she spotted something in the street and slowed down. A few seconds later, when she realized it was a child, she stopped her car and parked it across the secondary road so as to block traffic behind her (a propane truck was following her), and she got out to help the child. She picked him up and noted that he had scraped palms and a bloody nose as if he had fallen in the street. She asked the two children on the side of the road where the child belonged and they told her the petitioner's name and pointed to the house. The woman could only see the back of the house and side of the garage from where she picked up the boy. The front porch and door were not visible. Following the children's directions she left her car in the street and carried the little boy along the side of the secondary road bordering the petitioner's lot up to the corner of the side-street, turned right onto the sidewalk and finally right again into the petitioner's driveway. There she first saw the petitioner, who stepped off the front porch and met her in the driveway. The petitioner took the child from her arms and, without saying a word, took him into the house. The length of the walk from the side yard to the front of the house was somewhere between fifty and one hundred feet. It took the woman about three minutes to carry the child to the front porch because of the icy roads and sidewalks. Although she passes the petitioner's house on a daily basis, she has not observed children in the street since that time.

5. The petitioner agrees that the above occurred, but testified that she saw the child fall and watched as the woman stopped and picked him up, although she made no move toward him because she was frozen with fear. She estimated that she was in the house with the other children no more than a minute before the accident occurred. The petitioner's testimony in this regard is found to be inaccurate, however, based upon her own description of her house and the credible testimony of the woman who picked up the child as to the lack of visibility from the side road to the front of the house. It appears that the petitioner's testimony was intended to minimize the amount of time she was away from the two year old based on the dire consequences which followed for her. It is found based upon the testimony herein that the child was out of her sight from somewhere between three to five minutes and that she did not see him from the time she left him on the side front lawn until the time that the woman turned into her driveway with the child in her arms. The petitioner agrees that she did leave the child outside with the two older children for a minute or so but was not particularly concerned about that because he had never run into the street before and she believed all three children were following her into the house. In retrospect, the petitioner agrees that it was poor judgment to have left the child outside for even one minute and states that she never made that mistake again. 6. The incident was reported by the petitioner to her sister that night. The sister has had no complaints about the petitioner's prior or subsequent supervision of her children and characterized the incident as an isolated occurrence which emphasized for them both how

quickly her toddler son could take off and get into trouble. At the beginning of the Spring, the petitioner and her husband decided to fence in their yard as an additional method of safeguarding their children

and others in their care from the road. They mentioned their plan to fence the yard to a children's food program worker who was visiting their home. That worker later visited the home of the woman who had picked up the boy from the street on the icy winter day. When the worker mentioned that the petitioner was putting up a fence, the woman commented that it was probably a good idea because the house was at an intersection; and she casually related to the food stamp worker how she had found the toddler in the road a couple of months before. The food program worker felt obligated to report the incident to SRS, which initiated an investigation.

7. The investigation of the incident was assigned to an experienced SRS worker who first talked with the reporter (the food program worker) and then visited the petitioner on April 15, 1997. She also talked with the woman who picked up the child in the road, and attempted to find the driver of the propane truck to no avail. The information she received was substantially similar to that produced at the hearing, although the petitioner could originally offer no explanation as to why the children were out of her sight for a number of minutes, and she had stated at one point that she was in the backyard when the incident happened. Following her report, her supervisor determined to revoke the petitioner's registration due to a lack of supervision. On April 22, 1997, a letter was sent to the petitioner by the licensing chief informing her of the Department's decision, which is attached hereto as Exhibit One. The petitioner requested a Commissioner's Review, which was held on June 20, 1997. Following that review, the petitioner was provided with a letter by the Commissioner of SRS upholding the decision of the child care licensing chief, which is attached hereto as Exhibit Two. The licensing chief explained at hearing that the Department made its decision because the petitioner's lack of knowledge of where the children were made her unable to intervene immediately on behalf of the small child who had come upon a hazardous situation, which situation presented an unacceptable risk. The fact that the petitioner demonstrated that she understood that this was a serious lapse, that she understood that the child could have been seriously injured or killed by her inattention, that she took subsequent measures to prevent a reoccurrence, and that there had been no subsequent reoccurrence of children in street during the three or four months which elapsed from the time of the incident was not considered sufficient evidence for the Department to conclude that the petitioner could adequately supervise children in her care.

### ORDER

The decision of the Department to revoke the petitioner's day care registration certificate is affirmed.

### REASONS

The Commissioner of the Department of Social and Rehabilitation Services has the authority to adopt rules and regulations governing the day care registration program, including standards to be met and conditions for revocation. 33 V.S.A. § 306(b)(1). Those rules and regulations are required by statute to be "designed to insure that children in . . . family day care homes are provided with wholesome growth and educational experiences, are not subjected to neglect, mistreatment or immoral surroundings." 33 V.S.A. § 3502(d). Such rules and regulations have been adopted and are found in the "Regulations for Family Day Care Homes", effective April 1, 1993. Furthermore, the Commissioner has the specific authority to revoke registrations "for cause after hearing". 33 V.S.A. § 306(b)(3).

Among their regulations adopted by the Commissioner are the following:

### DEFINITIONS

CHILD CARE - The developmentally appropriate care, protection and supervision which is designed to ensure wholesome growth and educational experiences for children outside their homes for periods of less than 24 hours a day in a day care facility.

## PRESCHOOL

CHILDREN - Children from 3 years of age until their admission to first grade.

REVOCATION - The formal act of closing a day care home due to violation of these regulations. . . .

## SERIOUS

VIOLATION - A violation of group size, staffing requirements, or any violation which immediately imperils the health, safety or well-being of children. Serious violations may also include corporal punishment, lack of supervision, physical or sexual abuse or health and safety requirements.

## SUPERVISION

OF CHILDREN - The knowledge of an accounting for the activity and whereabouts of each child in care and the proximity of staff to children at all times assuring immediate

intervention of staff to safeguard a child from harm and maintenance of the program of the facility.

TODDLERS - Children between the ages of 17 months and 35 months.

## SECTION II - PROGRAM:

. . .

2. There shall be at least one caregiver present and providing child care at all times when children are in care.

During outside play:

- a. Infants and toddlers shall be supervised by a caregiver present,
- b. preschoolers and school age children may be monitored from inside the home if their area of play is within sight and earshot of a caregiver.

## SECTION V - HEALTH AND SAFETY:

1. The Registrant is responsible for the health and safety of children in care.

. . .

10. Children in care shall be protected from any and all conditions which threaten a child's health, safety and well-being. This includes protecting children from stoves, pools, poisons, asbestos, wells, known vicious animals, medications, dust or chips from lead paint, traffic and other hazards.

## Regulations for Family Day Care

### Homes

April 1, 1993

If the petitioner has failed to supervise children in her care, the Commissioner has the authority to determine what action to take and the "cause" needed to revoke a day care registration certificate if he deems it an appropriate remedy. 3 V.S.A. § 8814, Huntington v. SRS, 139 Vt. 416 (1981), Fair Hearing No. 10,414. The regulatory definition specifically lists lack of supervision as a "serious violation" of the regulations, and common sense would so dictate. The Board may only overturn such a decision if the Commissioner has acted arbitrarily, capriciously or has otherwise abused his discretion. Fair Hearing No. 12,804.

The issue in this case is whether it could be fairly concluded from the incident which occurred on that day that the petitioner is a person who does not supervise children in her care. The regulations set up a definition and an expectation that caregivers are to know the whereabouts of children and be in close enough proximity to intervene to protect the child from harm, including harm from traffic. The regulations set up a further expectation that infants and toddlers (including two year olds) playing outside must be personally supervised by caregivers.

No argument is made by the petitioner here that she was unaware of those regulations or that they place unreasonable requirements on providers. Neither does she argue that at least for a minute or possibly a little longer, she was not supervising the two-year-old in her care as the regulations prescribe. On the contrary she agrees that she should have been doing what the regulations require and that because she did not the child was placed in danger. She argues, however, that an isolated lapse in judgment which deviates from these requirements does not mandate the conclusion that she is unable to supervise children. She argues that the uniqueness and isolated nature of this incident, coupled with her understanding of the need for supervision and subsequent actions she had taken to meet that requirement, including heightened supervision and the fencing of her yard, make it unreasonable to conclude that she is an irresponsible person who does not know how to supervise children and hasn't learned from her mistake.

The Board has never been faced squarely with this issue before and must now decide whether an isolated incident such as this is sufficient evidence for the Commissioner to reasonably conclude that the petitioner cannot supervise children and should thus lose her day care certificate. The Board concludes in this matter that in this particular case, the event is sufficiently serious that the Department could reasonably conclude that the incident demonstrates an inability to supervise children in violation of the regulations. Although the Board may not necessarily agree with the decision of the Department, as a legal matter, it is bound to affirm the Department's exercise of its discretion unless it is shown to be clearly unreasonable, capricious, arbitrary, or an abuse of discretion. 3 V.S.A. § 3091(d), Huntington, supra. No such showing has been made in this case. As the petitioner has been found to have failed to supervise children in her care, the Department had "cause" to revoke her license. 33 V.S.A. § 306(b)(3).

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